

BEFORE THE DEPARTMENT OF PUBLIC  
HEALTH AND HUMAN SERVICES  
OF THE STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF ADOPTION,
Rules I through III, the amendment of	)	AMENDMENT, AND REPEAL
ARM 37.95.127, 37.95.227,	)	
37.106.2506, 37.111.523, and the	)	
repeal of 37.115.101, 37.115.104,	)	
37.115.105, 37.115.201, 37.115.301,	)	
37.115.302, 37.115.303, 37.115.305,	)	
37.115.306, 37.115.307, 37.115.308,	)	
37.115.309, 37.115.311, 37.115.312,	)	
37.115.313, 37.115.316, 37.115.317,	)	
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37.115.707, 37.115.801, 37.115.802,	)	
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37.115.902, 37.115.903, 37.115.905,	)	
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37.115.2103, 37.115.2104, )  
37.115.2105, 37.115.2201, )  
37.115.2203, 37.115.2205, )  
37.115.2207, 37.115.2209, and )  
37.115.2211 pertaining to pools, )  
spas, and other water features )

TO: All Concerned Persons

1. On July 20, 2018, the Department of Public Health and Human Services published MAR Notice No. 37-850 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 1387 of the 2018 Montana Administrative Register, Issue Number 14.

2. A statutory citation of an authority and implementation section was incorrectly shown for New Rules I through III. The department has adopted the following rules as proposed, but has corrected the authority and implementation citations, and has made the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (37.115.102) PURPOSE (1) and (2) remain as proposed.

AUTH: ~~50-52-102~~ 50-53-103, MCA

IMP: ~~50-52-102~~ 50-53-103, MCA

NEW RULE II (37.115.103) APPLICABILITY (1) New and existing public swimming pools must conform to the provisions of this code, and any other standard and code referenced herein, except as specified in FCS 3-2018, ~~Chapter 14~~, Grandfather Clause, or elsewhere in this chapter.

AUTH: ~~50-52-102~~ 50-53-103, MCA

IMP: ~~50-52-102~~ 50-53-103, MCA

NEW RULE III (37.115.106) INCORPORATION BY REFERENCE

(1) through (3) remain as proposed.

AUTH: ~~50-52-102~~ 50-53-103, MCA

IMP: ~~50-52-102~~ 50-53-103, MCA

3. The department has amended the following rules as proposed: ARM 37.95.127, 37.95.227, 37.106.2506, and 37.111.523.

4. The department has repealed the following rules as proposed: ARM 37.115.101, 37.115.104, 37.115.105, 37.115.201, 37.115.301, 37.115.302, 37.115.303, 37.115.305, 37.115.306, 37.115.307, 37.115.308, 37.115.309, 37.115.311, 37.115.312, 37.115.313, 37.115.316, 37.115.317, 37.115.319, 37.115.321, 37.115.323, 37.115.502, 37.115.503, 37.115.504, 37.115.505, 37.115.506, 37.115.507, 37.115.508, 37.115.509, 37.115.510, 37.115.511, 37.115.513, 37.115.515, 37.115.517, 37.115.518, 37.115.519, 37.115.521, 37.115.522, 37.115.523, 37.115.601, 37.115.602, 37.115.604, 37.115.605, 37.115.701, 37.115.702, 37.115.703, 37.115.705, 37.115.706, 37.115.707, 37.115.801, 37.115.802, 37.115.804, 37.115.805, 37.115.807, 37.115.902, 37.115.903, 37.115.905, 37.115.1001, 37.115.1002, 37.115.1003, 37.115.1005, 37.115.1006, 37.115.1007, 37.115.1008, 37.115.1009, 37.115.1010, 37.115.1011, 37.115.1012, 37.115.1015, 37.115.1016, 37.115.1017, 37.115.1019, 37.115.1020, 37.115.1022, 37.115.1101, 37.115.1103, 37.115.1201, 37.115.1202, 37.115.1203, 37.115.1301, 37.115.1302, 37.115.1304, 37.115.1305, 37.115.1307, 37.115.1308, 37.115.1309, 37.115.1310, 37.115.1311, 37.115.1313, 37.115.1314, 37.115.1315, 37.115.1401, 37.115.1402, 37.115.1403, 37.115.1404, 37.115.1405, 37.115.1406, 37.115.1501, 37.115.1503, 37.115.1505, 37.115.1507, 37.115.1601, 37.115.1602, 37.115.1603, 37.115.1604, 37.115.1701, 37.115.1702, 37.115.1703, 37.115.1704, 37.115.1801, 37.115.1803, 37.115.1804, 37.115.1805, 37.115.1806, 37.115.1807, 37.115.1808, 37.115.1809, 37.115.1810, 37.115.1811, 37.115.1812, 37.115.1813, 37.115.1815, 37.115.1817, 37.115.1819, 37.115.1821, 37.115.1823, 37.115.1824, 37.115.1825, 37.115.1826, 37.115.1827, 37.115.1828, 37.115.1835, 37.115.1836, 37.115.1837, 37.115.1838, 37.115.1839, 37.115.1840, 37.115.1845, 37.115.1846,

37.115.1847, 37.115.1901, 37.115.1902, 37.115.1903, 37.115.1905, 37.115.1907, 37.115.1909, 37.115.1910, 37.115.1911, 37.115.1912, 37.115.2001, 37.115.2002, 37.115.2003, 37.115.2101, 37.115.2103, 37.115.2104, 37.115.2105, 37.115.2201, 37.115.2203, 37.115.2205, 37.115.2207, 37.115.2209, and 37.115.2211.

5. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter stated that alkalinity should not be regulated as a shut-down offense in Circular FCS 3-2018, Chapter 2(B)(1)(a).

RESPONSE #1: The department disagrees. Facilities may be closed due to alkalinity at the discretion of the regulatory authority. It is not a mandatory immediate closure item.

COMMENT #2: A few commenters commented that alkalinity parameters in Circular FCS 3-2018, Chapter 2(B)(1)(a) conflicts with Circular FCS 3-2018, Chapter 7(G)(1).

RESPONSE #2: The department agrees and has changed the language in Chapter 2(B)(1)(a) [renumbered 2.2.1(a)] to match Chapter 7(G)(1) [renumbered 7.7.1].

COMMENT #3: A commenter asked if existing spray decks with recirculating water supplies would be required to have UV treatment or if they would be protected under the grandfather clause.

RESPONSE #3: The department believes there has been no change to this requirement. Splash decks with recirculating water supplies that were approved under the previous rule were also required to have a secondary disinfection system such as UV treatment. Any splash deck approved and built prior to these requirements would be grandfathered in until they lost their grandfather clause status.

COMMENT #4: A commenter stated that the free chlorine parameters in Circular FCS 3-2018, Chapter 7(G)(1) should be reworded to clarify the use of stabilizer.

RESPONSE #4: The department disagrees and believes the existing proposed language makes it clear when stabilizer should be used.

COMMENT #5: A commenter stated that minimum free chlorine concentrations listed in Circular FCS 3-2018, Chapter 7(G)(1) should be amended to read 2 ppm in outdoor pools and 1 ppm in indoor pools because the free chlorine concentration in unstabilized outdoor pools would quickly drop below recommended levels.

RESPONSE #5: The department disagrees. The proposed language is consistent with what is recommended in the Model Aquatic Health Code (MAHC).

COMMENT #6: A commenter is in support of Circular FCS 3-2018, Chapter 4(I)(4), Dog Swim Days.

RESPONSE #6: The department thanks the commenter for the support.

COMMENT #7: A commenter asked what category spray decks fall under with regard to required turnover rate in Circular FCS 3-2018, Chapter 5(A).

RESPONSE #7: The department refers to the International Swimming Pool and Spa Code (ISPSC), Chapter 6, Table 604.2 in addition to the circular. All existing public swimming pools would be required to meet the historical turnover rates in effect at the time of their original approval. Circular FCS 3-2018, Chapter 5(A) [renumbered 5.1] gives some historical turnover rates. Additional turnover rates can be found in the rule that was in effect at the time of the pool plan approval. If they are newly built, or existing and lose their grandfather status, then they would need to meet the current turnover rate in ISPSC, Table 604.2. A splash deck is regulated as a class D-6 Interactive Play Attraction in the ISPSC.

COMMENT #8: A commenter is in support of Chapter 5(B)(2), flow turndown system.

RESPONSE #8: The department thanks the commenter for the support.

COMMENT #9: A few commenters are confused over the term "DPD" in Circular FCS 3-2018, Chapter 7(A)(1) and (A)(3).

RESPONSE #9: The department agrees that "DPD" is not a term that is appropriately used to reference most specific tests. However, this section is referring to an entire test kit. The department has changed the language in Circular FCS 3-2018, Chapter 7(A)(3) [renumbered 7.1.3] from "DPD test kit" to "FAS-DPD test kit."

COMMENT #10: A commenter references Circular FCS 3-2018, Chapter 7(B)(5), Total Alkalinity must be tested weekly, and asked why we would back off daily alk testing if we are newly making low alk a shut down offense.

RESPONSE #10: The department's current rule on testing, ARM 37.115.1302, requires alkalinity testing once per week. Circular FCS 3-2018, Chapter 7(B)(5) [renumbered 7.2.5], maintains a weekly requirement for alkalinity testing.

COMMENT #11: A commenter reported that operators may need to add sodium bicarbonate as frequently as 3 or 4 times per day to maintain alkalinity when using muriatic acid.

RESPONSE #11: The department does not see a question or proposed change in this comment. Alkalinity should stay fairly stable if the pool water is balanced through the proper process and make-up water is not having to be added constantly.

COMMENT #12: A commenter suggests that weekly alkalinity testing be allowed for certain pools.

RESPONSE #12: The department thanks the commenter for the suggestion, but the department is not proposing any changes to alkalinity testing frequency and is maintaining it at once per week.

COMMENT #13: A commenter agrees with the change to calcium hardness testing frequency in Circular FCS 3-2018, Chapter 7(B)(6).

RESPONSE #13: The department thanks the commenter for the support.

COMMENT #14: A commenter stated that Circular FCS 3-2018, Chapter 8(B)(2) should be modified to allow for glare off the water.

RESPONSE #14: The department disagrees. If glare is a factor, the observation point should be moved. The sign does not say that an observer must be able to see the main drains from "all" points around the pool.

COMMENT #15: A commenter said the signage requirement of Circular FCS 3-2018, Chapter 8(B)(3)(d) should be modified to require a responsible adult or lifeguard to be in attendance with nonswimmers and children under 14.

RESPONSE #15: The department disagrees. On-duty lifeguards are required to be attentive to their jobs and not be distracted. Making a lifeguard responsible for supervising nonswimmer children is a serious distraction from their professional job. Any off-duty lifeguard, attendant, or other employee could fill the role of a responsible adult if the facility wants to take on that responsibility, but not an on-duty lifeguard.

COMMENT #16: A commenter reported that a Montana code recognizes a 12-year old as being able to be home alone and responsible for other younger children. The commenter further states that the signage requirement of Circular FCS 3-2018, Chapter 8(B)(3)(d) should be modified to reduce the age to at least 11 years, but preferably to 7.

RESPONSE #16: The department disagrees. The department is unaware of any state code that establishes a minimum age for babysitting or being left home alone. The MAHC requires that children be supervised by a responsible adult (parent or caregiver). The supporting language of the MAHC Annex states that many standards recognize that a person who is under the age of 14 years of age is considered to be a child, and that their ability to make decisions, especially when complying with rules, requires adult supervision.

COMMENT #17: A commenter supports Circular FCS 3-2018, Chapter 9, Zone of Patron Surveillance.

RESPONSE #17: The department thanks the commenter for the support.

COMMENT #18: A commenter requests a modification to ARM 37.115.1602(1), WHEN LIFEGUARDS ARE NOT REQUIRED, that would allow for equivalent CPR training courses to be accepted and to restrict training to hands-on classes.

RESPONSE #18: The department agrees, but notes ARM 37.115.1602 is being repealed. The language from the repealed rule is incorporated in modified form to allow for equivalent courses in Circular FCS 3-2018, Chapter 9(C) [renumbered 9.3] for lifeguard training requirements and Circular FCS 3-2018, Chapter 9(E) [renumbered 9.5] for attendant training requirements. The department has added language to prohibit Lifeguard, CPR, and CPO classes that do not include a hands-on training curriculum.

COMMENT #19: A commenter suggested adopting MAHC language regulating the color of pool finishes.

RESPONSE #19: This topic is already regulated in the 2015 ISPSC Section 307.7. The department is unable to amend the ISPSC or adopt construction-related rules that have not already been adopted by the Department of Labor and Industry.

COMMENT #20: A commenter supports Circular FCS 3-2018, Chapter 2(A).

RESPONSE #20: The department thanks the commenter for the support.

COMMENT #21: A commenter supports Circular FCS 3-2018, Chapter 2(A)(1)(b).

RESPONSE #21: The department thanks the commenter for the support.

COMMENT #22: A commenter is concerned that the term "reference point" used in the circular is not defined and suggests adopting language from the MAHC related to marker tiles and clarity observations.

RESPONSE #22: The department is unable to adopt construction-related rules that have not already been adopted by the Department of Labor and Industry. The department is reluctant to try to specifically define "reference point," because a reference point could be virtually anything that has been approved by the regulatory authority. Circular FCS 3-2018, Chapter 7(I)(2) [renumbered 7.9.2] addresses water clarity directly and states that an observer must be able to see the main drain, or other approved device placed in the deepest part of the bottom of the public swimming pool. Chapter (I)(3) [renumbered 7.9.3] further states that this reference point must be visible from any point on the deck up to thirty feet away in a direct line of sight.

COMMENT #23: A commenter suggests that the turbidity standard found in the current rule be retained as a quantitative measure of clarity.

RESPONSE #23: The department disagrees. Turbidity does not have a direct quantifiable relationship to clarity and there are no recognized national standards for turbidity levels in relation to clarity and personal safety concerns in the MAHC.

COMMENT #24: A commenter has requested modification of Circular FCS 3-2018, Chapter 2(A)(1)(p) which states, "the public swimming pool does not comply with the requirements of ANSI/APSP/ICC-7-2013 Suction Entrapment Avoidance in Swimming Pools, Wading Pools, Spas, Hot Tubs, and Catch Basins based on a visual inspection and review of drain cover documentation." The commenter would prefer to use the word "or" in place of "and."

RESPONSE #24: The department agrees that this section could be interpreted in multiple ways. Our intent is for the inspector to conduct both visual inspections of the drain covers as well as a review of the drain cover documentation. The question of closure of a pool is independent and could be based on either of those criteria individually. The department has made a change in the language.

COMMENT #25: A commenter has requested a change to Circular FCS 3-2018, Chapter 3(A)(1) to allow for submittal of plan review documents to the local health authority for review.

RESPONSE #25: The department wants to keep the final plan reviews limited to one central office to promote integrity and consistency of the program across the state. Local health authorities are welcome to provide input on any plan review of facilities in their respective jurisdictions. Chapter B(1) [renumbered 3.2.1] of Chapter 3 requires duplicate plans and specifications to be submitted to the department for review. The department has added language to modify this section to require only a single set of plans and specifications be sent to the department and a set be sent to the local regulatory authority. This allows a copy of the files to be conveniently maintained for future use as well as provide local authorities with the materials necessary for a review so they are able to provide comments to the department if they desire.

COMMENT #26: A commenter comments that Circular FCS 3-2018, Chapter 3(O)(1)(d) requires a facility to upgrade to new standards upon the cancellation of a license before a new license is issued to a new owner. The commenter suggests that this may require extensive work and that it may be more reasonable to wait until the pool is renovated.

RESPONSE #26: The department agrees that it may not want to force upgrades for every construction issue during a change of ownership. The department disagrees with the commenter's interpretation of this section. The rule referenced by the commenter is addressing the loss of grandfather status after the specific administrative enforcement action of cancelling a license. That would cause the loss of grandfather status and require a plan review and upgrade to current standards before re-licensure. However, the specific scenario given by the commenter is

referring to the fact that licenses are nontransferable under 50-53-204, MCA. When a facility is sold the license is unable to be transferred to a new owner so that license is closed and the new owner must apply for a new license. We do not consider this to be a cancellation. For clarification, the department is adding the following language to Chapter 3(O)(4) [renumbered 14.4]: "the regulatory authority may require a plan review and upgrade to new construction standards, due to health or safety risks, during a change of ownership." The department notes there is nothing prohibiting the regulatory authority from accepting a long-term plan of correction for upgrades that are not immediate health threats that are also financially prohibitive in the short term.

COMMENT #27: A commenter requests that Circular FCS 3-2018, Chapter 4(F) be modified to include "decks must be free of any trip, injury, or slip hazards."

RESPONSE #27: The department agrees that unsafe situations should be corrected and has modified the language of (F)(2) [renumbered 4.6.2] to read, "All deck surfaces must be clear of tripping or other injury hazards." Slip resistance and cleaning is addressed in other sections of the rule. Care must be taken not to conflict with building tolerances and other building codes.

COMMENT #28: A commenter requests the addition of a section to Circular FCS 3-2018, Chapter 4 that requires facilities to be kept clean and in good repair. This would include slip resistant floors, easily cleanable surfaces, and adequate lighting.

RESPONSE #28: The department directs the commenter to Circular FCS 3-2018, Chapter 4(E)(1) [renumbered 4.5.1]. All public swimming pools and related facilities must be maintained in a safe, clean, and sanitary condition at all times. Flooring materials and lighting are all regulated by the ISPSC and other applicable building codes.

COMMENT #29: A commenter comments that the current rule has many sections of safety measures for CO<sub>2</sub> storage that have not been added to the circular and has requested the retention of the requirements to protect public safety, especially the requirement to store CO<sub>2</sub> above grade.

RESPONSE #29: The department disagrees. Storage of hazardous chemicals is regulated through applicable building and fire codes and much of that is related to construction standards.

COMMENT #30: A commenter supports Circular FCS 3-2018, Chapter 4(A)(3), lockable safety covers for spas and hot tubs and powered safety covers for pools are not sufficient to meet barrier or alternate methods required in this section.

RESPONSE #30: The department thanks the commenter for the support.

COMMENT #31: A commenter suggests that a rule be added to Circular FCS 3-2018, Chapter 5(F) to require that automated controllers be maintained and operated as per manufacturer specifications.

RESPONSE #31: The department disagrees that a new rule is necessary. Automated controllers are part of the circulation equipment. Please refer to Chapter 5(B)(4) [renumbered 5.2.4]. All circulation equipment must be maintained according to manufacturer's instructions. In the absence of manufacturer's instructions, all components must be maintained as needed to ensure system performance is not impeded.

COMMENT #32: A commenter requested that a section be added to Circular FCS 3-2018, Chapter 5, (F) to give the regulatory authority the ability to require an automatic controller on facilities with repeat or two consecutive closure situations because of inadequate free chlorine, inadequate ORP or pH out of parameter.

RESPONSE #32: The department agrees and has added language to Circular FCS 3-2018, Chapter 5(F) [renumbered 5.6].

COMMENT #33: A commenter reported that Circular FCS 3-2018, Chapter 6(B)(2) records must be maintained on forms approved by the department, would put an undue burden on the department and the rule should be changed to "regulatory authority" instead of "department" to give operators and inspectors the continued ability to review and approve records.

RESPONSE #33: The department disagrees. This requirement has not changed from previous rules so there is no change to burden on the department. The department hopes to maintain better statewide consistency by continuing to require department-approved forms that are provided electronically on our website.

COMMENT #34: A commenter suggests that Circular FCS 3-2018, Chapter 7(E)(3) might be better if changed to say 0.4 ppm above source water, due to high levels of chloramines in the source water.

RESPONSE #34: The department disagrees. The national standard (MAHC) is no greater than 0.4 ppm combined chlorine. The MAHC reports that health symptoms can begin to show between 0.3 and 0.5 ppm.

COMMENT #35: A commenter supports Circular FCS 3-2018, Chapter 7(E)(6).

RESPONSE #35: The department thanks the commenter for the support.

COMMENT #36: A commenter stated that Circular FCS 3-2018, Chapter 9 is a difficult regulation to interpret and enforce and if the standards for placement of lifeguards are adopted as written, training for standards of review and inspection must be provided to local health authorities.

RESPONSE #36: The department is happy to provide training and answer questions. Circular FCS 3-2018, Chapter 9(E) [renumbered 9.5] is new to sanitarians, but is part of the national standard (MAHC), and is taught in lifeguard certification courses. The intent is for managers to develop a staffing plan that also identifies zones of patron surveillance as described in the rules. The regulatory authority will need to verify that a plan has been designed and implemented, but we do not necessarily expect them to test some of the specifics such as lifeguard swim time or zone scan time. These particulars are beyond our scope and more applicable to facility management and trained lifeguard supervisors. However, the criteria for establishing a zone are fairly simple. The department encourages the regulatory authority to become knowledgeable so they are able to recognize when a facility may not be providing sufficient numbers of lifeguards.

COMMENT #37: A commenter stated that a description of who is to review and approve the lifeguard plan (Circular FCS 3-2018, Chapter 9(D)) needs to be included. Sanitarian training does not include best practices for lifeguard placement. As written, the regulatory authority is in the position of determining whether a zone designation is sufficient for public safety.

RESPONSE #37: The department's position is that the licensee is ultimately responsible for developing and implementing the staffing plan as required by law, Circular FCS 3-2018, Chapter 9(D)(1) [renumbered 9.4.1]. As noted in the above comment, the regulatory authority will be responsible for verifying that a sufficient plan exists and that it meets the intent of the law during their routine inspections. All specifics are included in the rule and should not require any specialized training to evaluate.

COMMENT #38: A commenter stated that the current standard of square footage per lifeguard requirement and/or the standards for number of lifeguards provided per number of bathers as set forth by the ARC and other official lifeguard training courses would provide a clear and easily enforceable standard.

RESPONSE #38: The department disagrees. The department does not believe the previous lifeguard density standard was sufficient for all circumstances because it did not adequately account for bather density and zone size. The proposed approach allows the lifeguard manager to tailor the system to their particular needs at any particular time while providing a sufficient number of lifeguards to meet public safety needs. This approach is required in national standards (MAHC) and as part of lifeguard certification programs such as StarGuard.

COMMENT #39: A commenter requested clarification of the term "operated for individual use" in Circular FCS 3-2018, Chapter 1(22), "Float tank." Also would "float tank" apparatus be considered in the definition of "hydrotherapy pool" or "therapeutic pool"?

RESPONSE #39: Float tanks are, by their very purpose, designed to be used by only one person at a time. They are an individual treatment so we do not consider

them to be public in the same sense as a municipal pool or hot tub. They are also unique in that the body of water is extremely saline and very small. The water is treated, generally by UV and ozone, filtered, and recycled into the float tank. Treatment systems will treat at least 99.9% of all water between users. This is better than the efficiency provided by a standard pool or even a spa. To the best of the department's knowledge, there have been no outbreaks or injuries associated with float tanks. Because of these reasons, the department believes that float tanks are not strictly public, and they do not provide a significant public health risk that would require licensing and regulation.

COMMENT #40: A commenter asked what is the importance of having the definition Circular FCS 3-2018, Chapter 1(22) "full facility inspection." Where and how is this term used in the proposed rule?

RESPONSE #40: Full Facility Inspection is used in statute, but not defined in statute. The department believes it is useful to provide a definition within the rule.

COMMENT #41: A commenter asked the department to provide clarifying terms to the definition Circular FCS 3-2018, Chapter 1(42) "person in charge (PIC)."

RESPONSE #41: The department disagrees the definition is unclear. Every pool will have somebody that is in charge. That person may or may not be trained in swimming pool operation. In some cases, the PIC may be the attendant or the CPO. It might be a general facility manager or a housekeeper. It is whoever assumes responsibility for the facility at the time of inspection or incident.

COMMENT #42: A commenter requested that the department modify the definition Circular FCS 3-2018, Chapter 1(50), "residential swimming pool."

RESPONSE #42: The department agrees and has modified the definition to read "invited guests" instead of "guests."

COMMENT #43: A commenter requested modifying Circular FCS 3-2018, Chapter 2(A)(1) to account for potential ORP malfunctions.

RESPONSE #43: The department disagrees. A minimum limit for oxidation reduction potential (ORP) is set in the Circular. The department encourages regulatory authorities to close facilities based on actual residual sanitizer concentrations. If the regulatory authority chooses to inspect based on ORP then it should use its own ORP meter for enforcement purposes and keep good calibration check logs before and after each field outing. Facilities are required to maintain functional automated controls. If their ORP meter is not operating properly then it would be in violation of other rules, but would not necessarily result in closure so long as the actual water chemistry is within safe parameters.

COMMENT #44: A commenter requests a quantitative light meter value be added to Circular FCS 3-2018, Chapter 2(A)(1)(k).

RESPONSE #44: The department disagrees. There are related lighting requirements with minimum values in the ISPSC, but those are to be taken at the water surface and would not necessarily ensure sight of the main drain during all circumstances. The department recommends evaluating this as part of a clarity evaluation with the same standards.

COMMENT #45: A commenter points out the spelling of "lightening" in Circular FCS 3-2018, Chapter 2(A)(1)(m).

RESPONSE #45: The department agrees and has made the change.

COMMENT #46: A couple of commenters requested modification of Circular FCS 3-2018, Chapter 2(A)(4) to require notification of local health departments of pool-related deaths, or serious accident or injury.

RESPONSE #46: The department disagrees. The department does not believe this needs to be in rule, as it has the discretion to forward information to the local regulatory authority.

COMMENT #47: A commenter requested modification of Circular FCS 3-2018, Chapter 2(A)(4) to add the FCS email address for communication of death or serious injury events.

RESPONSE #47: The department disagrees. Email is not a secured form of communication. Reports could include individually identifiable health information subject to protections under the Health Insurance Portability and Accountability Act (HIPAA) for which email would not be an appropriate form of communication.

COMMENT #48: A commenter asks if there is a possible rule conflict or misinterpretation between Circular FCS 3-2018, Chapter 2(B)(1) and Chapter 12(A)(6).

RESPONSE #48: The language from these rules comes from the department's current rules. The department is unaware of any past conflicts or misinterpretation, but can see how the language could be confusing. For clarity, the department has removed the language in Chapter 12(A)(6).

COMMENT #49: A commenter comments that use of the term "repeated and documented violations" in Circular FCS 3-2018, Chapter 2(C)(4) is vague and open-ended.

RESPONSE #49: The department agrees and has modified the language.

COMMENT #50: A commenter suggests to modify Circular FCS 3-2018, Chapter 2(D)(1)(b) to remove "2016 edition" and replace with "current edition published by the CDC."

RESPONSE #50: The department disagrees and believes it must reference the edition in existence at the time of the proposed rulemaking.

COMMENT #51: A commenter asked if the term "approved" in Circular FCS 3-2018, Chapter 2(D)(1)(d) refers to the department or to the local health department.

RESPONSE #51: The department intends to do approvals to keep the forms consistent across the state. The department has modified the language to read: "document the incident using a department-approved fecal incident log."

COMMENT #52: A commenter asks what is the purpose and intent for the applicant to submit duplicate plans and specifications to the department as requested in FCS 3-2018, Chapter 3(B)(1).

RESPONSE #52: This came from prior rule language. The department believes the language is no longer necessary. The department has removed the language.

COMMENT #53: A commenter asked if the local health department is able to or required to perform the site visit or is it solely the responsibility of the department as regulated by Circular FCS 3-2018, Chapter 3(D)(5).

RESPONSE #53: The department is able to require an interim site visit as part of the plan review process. This may be conducted by the department or the department may request the assistance of the local regulatory authority.

COMMENT #54: A commenter suggests changing the term "department" in Circular FCS 3-2018, Chapter 3(D)(5) to "regulatory authority."

RESPONSE #54: The department disagrees. The site visits may be conducted by the department or the department may request the assistance of the local regulatory authority.

COMMENT #55: A commenter asked if the intent of Circular FCS 3-2018, Chapter 4(G)(3) is that a handwashing sink be required in the swimming pool area. The commenter also commented that the rule seems vague, possibly with respect to the distance from a handwashing sink and waste receptacle.

RESPONSE #55: This regulation is in the section titled dressing rooms, toilets, and shower areas so this rule is intended to require a diaper changing area in a dressing room, toilet, or shower area that is conveniently located near a handwashing sink and waste receptacle. The department believes the regulatory authority can use some discretion to determine if a diaper changing area is located in the proper area that is convenient for use by a diaper changing parent.

COMMENT #56: A commenter suggested the term "Glass" in Circular FCS 3-2018, Chapter 4(H)(4) be changed to a term such as "breakable containers" or some other phrase that better fits the intent of this rule.

RESPONSE #56: The department disagrees and believes that the term "glass" fits the intent of the rule.

COMMENT #57: A commenter requested the addition of "or notified by some other effective means" to Circular FCS 3-2018, Chapter 6(A)(3).

RESPONSE #57: The department agrees and has amended the language.

COMMENT #58: A commenter requested clarification of Circular FCS 3-2018, Chapter 9(E)(2) and asks if an attendant could be a desk attendant, housekeeper, maintenance employee, or some other employee working at a public accommodation establishment.

RESPONSE #58: An attendant can hold any position of employment that allows them to be on the premises with reasonable access to the pool for supervision.

COMMENT #59: A commenter asked if the phrase "has staff present or" should be omitted from Circular FCS 3-2018, Chapter 12(A)(1). What is the purpose and intent of including this phrase into rule?

RESPONSE #59: The department believes the language is necessary and should not be omitted. The language allows for an inspection not only while a facility is operating for the public, but also if there is staff present conducting cleaning or maintenance.

COMMENT #60: A commenter asks if there is any specific rule that addresses when pools/spas should be licensed in tourist home operations.

RESPONSE #60: There is not. The department believes that a tub which is drained, filled, and sanitized between users could be considered a single-use medicinal tub and would be exempt from licensure. Otherwise, pools or spas in a tourist home would need to be licensed as a public swimming pool.

COMMENT #61: A commenter asked if there is a specific rule that addresses a license, CPO, PIC, or attendant that fails in the duties of providing active managerial control in supervising operations at a facility.

RESPONSE #61: The department is not aware of any specific rule.

COMMENT #62: A commenter asked if the reason behind more stringent water chemistry parameters and frequency of water testing is based on peer-reviewed scientific evidence that is available in published materials.

RESPONSE #62: These parameters were mostly taken from the MAHC. The department refers the commenter to the MAHC, and the MAHC Annex.

COMMENT #63: A commenter requests that the department also update ARM 37.111.339, which required bed and breakfast facilities to follow the current regulations.

RESPONSE #63: The department intends to amend this rule at a future time.

COMMENT #64: A commenter commented that NEW RULE III (ARM 37.115.106) needs changes to make the adoption language more consistent and clear.

RESPONSE #64: The department agrees and has amended the language.

COMMENT #65: A commenter commented that the AUTH and IMP references for NEW RULES I, II, and III incorrectly reference 50-52-102, MCA and recommends 50-53-103, MCA.

RESPONSE #65: The department agrees and has changed the references to 50-53-103, MCA.

COMMENT #66: A commenter is in support of the adoption of the ISPSC.

RESPONSE #66: The department thanks the commenter for the support.

COMMENT #67: A few commenters reported that it seems the intention is for the ISPSC to only be applicable for new pool construction or remodel/renovation of existing pools and are confused on the application of the grandfather clause so it would be helpful to state that intent in rule.

RESPONSE #67: The department intends for the ISPSC to be an integral part of the rule. Most of the ISPSC is construction related and would be applicable mostly to new pool construction, but also to any pool that loses their grandfather status and certain specific items such as barriers and Virginia Graham Baker rules that are not protected by grandfather clauses. The department believes that the grandfather clause is clear on what is grandfathered in and what is not.

COMMENT #68: A commenter stated that the partial adoption of the ISPSC strikes signage requirements in Sections 509.2 and 611, but retains section 412 and they feel that the rule will be most user friendly if all signage requirements were in one location.

RESPONSE #68: The department agrees that it would be better if we could put all of the signage requirements in one place; however, the department wishes to retain the language in section 412. The department has added language to Circular FCS 3-2018, Chapter 8, requiring compliance with ISPSC Section 412 for all public swimming pools instead of only pool type facilities.

COMMENT #69: A few commenters stated that ISPSC Section 412 lists emergency phone and shutoff signage requirements; however, there is no language requiring an emergency phone and no language in the circular showing that a shutoff switch is a requirement for both new and existing facilities. The commenter recommends ISPSC Section 412 be deleted and the language be moved to Circular FCS 3-2018, Chapter 8.

RESPONSE #69: The department disagrees and believes the signage requirements are sufficient.

COMMENT #70: A commenter stated that the Circular FCS 3-2018 needs a table of contents and the numbering/letter in the circular makes it difficult to follow. The commenter recommends using a numerical system, i.e., 4.2.1 instead of Chapter 4, Section B, Subsection 1.

RESPONSE #70: The department agrees and has changed the numbering in the circular to reflect this, and has added a table of contents.

COMMENT #71: A commenter requests that Circular FCS 3-2018, Chapter 13 include an allowance for enforcement proceedings to follow a local administrative process, when one is in place.

RESPONSE #71: The department disagrees. By statute, when the department denies, suspends, cancels, or implements corrective action, the license applicant or licensee has the right to request a hearing before the department to be conducted in accordance with the Montana Administrative Procedure Act. Section 50-53-212, MCA. The health officer does have the right to refuse to validate a license and the administrative process for that specific procedure allows the licensee to request a hearing before the local board of health.

COMMENT #72: A commenter stated that rule chapter or section headings are legally significant and notes that Chapter 3, "Plan Review" contains the variance and grandfather clause sections. The commenter suggests separating out these sections so they are not mistakenly applied only to plan review.

RESPONSE #72: The department partially agrees. To make the Circular more user friendly, the department is putting the "Variance" and "Grandfather Clause" sections into separate chapters.

COMMENT #73: A commenter comments on Circular CS 3-2018, Chapter 3(E)(1) that the term "chapter" restricts the variance process to only those regulations in Chapter 3.

RESPONSE #73: The department agrees and has amended the language.

COMMENT #74: A commenter requests the addition of variance limiting criteria to Circular FCS 3-2018, Chapter 3(E) and gives examples.

RESPONSE #74: The department disagrees and believes the criteria proposed by the commenter are too restrictive.

COMMENT #75: A commenter recommends the addition of language to Circular FCS 3-2018, Chapter 3(E) that makes it clear the department can place enforceable conditions on any variance they grant.

RESPONSE #75: The department agrees and has added a new section to make it clear.

COMMENT #76: A commenter comments that Circular FCS 3-2018, Chapter 3(E)(4) limits the department's ability to revoke a variance, makes it a reactive response to an ambiguous term "significant" and recommends modifying it to read "The department may revoke a variance at any time to prevent or abate a public health risk, or if there is documented non-adherence to the variance conditions."

RESPONSE #76: The department agrees, in part, and has amended the sentence by removing the term "significant" from Circular FCS 3-2018, Chapter 3(E)(4) [renumbered 15.4].

COMMENT #77: A commenter requests the addition of language to circular FCS 3-2018, Chapter 3(E)(5) to allow the regulatory authority to locally review variances or to add language to prohibit the state's approval if opposed by the local regulatory authority.

RESPONSE #77: The department disagrees. The department desires to keep the variance process consistent across the state and as streamlined as possible. Some of the variance requests could be quite technical and require research or further investigation. The department is happy to provide information concerning the variance requests to local departments and receive comments on the variance requests.

COMMENT #78: A commenter reports that Circular FCS 3-2018, Chapter 3(O)(1) limits itself to Chapter 3.

RESPONSE #78: The department agrees and has modified the language.

COMMENT #79: A commenter asked if the purpose of Circular FCS 3-2018, Chapter 4(A) is to require installation of barriers, regardless of grandfather status and requests that it be directly stated in the circular.

RESPONSE #79: The department is requiring installation of barriers in all public swimming pools. The department believes this is made clear in Circular FCS 3-

2018, Chapter 4(A)(1) and (2) [renumbered 4.1.1 and 4.1.2] as well as Circular FCS 3-2018, Chapter 3(O)(3) [renumbered 14.3], Grandfather Clause.

COMMENT #80: A commenter comments that they do not believe that public swimming pools with no standing water should have to install barriers.

RESPONSE #80: The department agrees and has amended language in Circular FCS 3-2018, Chapter 4(A) [renumbered 4.1].

COMMENT #81: A commenter makes a number of suggestions for minor language changes to remove unnecessary language or fix references.

RESPONSE #81: The department agrees and has made the changes suggested by the commenter.

COMMENT #82: A commenter requested the change of "department" to "regulatory authority" in a number of places.

RESPONSE #82: The department disagrees, with the exception of Circular FCS 3-2018, Chapter 11(A)(3) [renumbered 11.1.3] and has changed "department" to "regulatory authority."

COMMENT #83: A commenter asks for clarification on the intent of Circular FCS 3-2018, Chapter 2(C)(3).

RESPONSE #83: The intent of the rule is to require the use of a secondary disinfection system for splash decks with recirculating water supplies. Anything that was built under the previous rule would already have UV treatment. Anything built under the new rule will be required to use a secondary disinfection system. Any splash deck with recirculating water built before this was a requirement is grandfathered in until such time as it loses its grandfather status.

COMMENT #84: A commenter asks if a spray pool has standing water, while a splash deck does not, and recommends the terms be defined.

RESPONSE #84: Yes, that would be the correct distinction to make; however, a splash deck is a special subtype of spray pool which is the defined term in the ISPSC. The department has added a definition of "splash deck" to mean a spray pool that does not have standing water.

COMMENT #85: A commenter stated that the proposed rule does not include a basic requirement that every public swimming pool have an available toilet facility and suggests including a requirement for a toilet facility with a handwashing station.

RESPONSE #85: The department disagrees. Class C semipublic pools are the only facilities that are not discussed in the ISPSC, but generally have restrooms available for guests. Class A and B must meet applicable building code

requirements. Class D aquatic recreation facilities have their own requirements in the ISPSC.

COMMENT #86: A commenter is unclear on the intent of Circular FCS 3-2018, Chapter 4(G)(3).

RESPONSE #86: The department's intent is to require a diaper changing area in the dressing room, toilet, or shower area of any public pool that allows diaper-aged children. The department has amended the language by adding diaper changing areas to the list in Chapter 3(O)(3) [renumbered 14.3].

COMMENT #87: A commenter requests that Circular FCS 3-2018, Chapter 4(N)(1) be modified to be more specific.

RESPONSE #87: The department agrees with the recommendation and has amended the language in Chapter 4(N)(1) [renumbered 4.14.1], to read "The equipment room must be locked at all times, unless occupied by authorized persons or staff."

COMMENT #88: A commenter recommended language be added to Circular FCS 3-2018, Chapter 4(B)(1) to require adequate ventilation in equipment rooms.

RESPONSE #88: The department agrees; however, be mindful that any specific design details must come from applicable mechanical codes. The department has amended language to add equipment rooms to Circular FCS 3-2018, Chapter 4(B)(1) [renumbered 4.2.1].

COMMENT #89: A commenter recommends adding language to Circular FCS 3-2018, Chapter 4(O)(2) to prohibit the storage of chemicals in proximity to a heat source.

RESPONSE #89: Chemicals are required to be stored in accordance with the Material Safety Data Sheet (MSDS) which generally requires chemicals to be stored in a cool, dry, well-ventilated place.

COMMENT #90: A commenter gives multiple recommendations for Circular FCS 3-2018, Chapter 5(A) to be changed to eliminate contradicting or confusing requirements in turnover rates.

RESPONSE #90: The department agrees, in part, and has made changes to the language in Circular FCS 3-2018, Chapter 5(A) [renumbered 5.1].

COMMENT #91: A commenter stated that Circular FCS 3-2018, Chapter 5(F)(1) be modified to contain the actual adoption date of the original circular.

RESPONSE #91: The department agrees and has amended the circular to reflect this change.

COMMENT #92: A commenter stated that there is an incorrect circular reference in Circular FCS 3-2018, Chapter 6(B)(3) which should read "Chapter 7(B)."

RESPONSE #92: The department agrees and has made the change.

COMMENT #93: A commenter stated that there is an incorrect circular reference in Circular FCS 3-2018, Chapter 7(A)(4) which should read, Chapter 6(B)(3)(a) through (g).

RESPONSE #93: The department agrees and has inserted the correct reference.

COMMENT #94: A commenter comments that there is an incorrect circular reference in Circular FCS 3-2018, Chapter 9(B)(1) which should read Chapter 9(A).

RESPONSE #94: The department agrees and has inserted the correct reference.

COMMENT #95: A commenter recommends the addition of language requiring the elimination of glare.

RESPONSE #95: The department disagrees and is unable to adopt construction related requirements from the MAHC. However, under Circular FCS 3-2018, Chapter 7, the facility is required to take remedial action if they are unable to see the bottom of the pool for any reason including glare. This could include adding blinds that would be closed at certain times of the day to reduce glare.

COMMENT #96: A commenter recommends that Circular FCS 3-2018, Chapter 2(A)(1)(b) be modified to include an additional statement such as "regardless of chlorine residual measurement."

RESPONSE #96: The department disagrees. The department believes the language it has proposed makes it clear that the pool is to be closed if ORP is less than 650 mV.

COMMENT #97: A commenter requests that the pH closure range be changed to match the pH acceptable range listed in Circular FCS 3-2018, Chapter 7(G)(1).

RESPONSE #97: The department disagrees. The language is consistent with the MAHC.

COMMENT #98: A commenter recommends a change to Circular FCS 3-2018, Chapter 7(G)(1) to clarify the water parameters for calcium hardness and cyanuric acid.

RESPONSE #98: The department agrees that this could be clearer and has amended the language to show reversing the order of these parameters to the maximum limit is first, and putting the "ideal" limit second and in small italics.

COMMENT #99: A commenter comments on Circular FCS 3-2018, Chapter 7(G)(1) and 7(I)(4) that a sanitarian cannot require a facility to make changes to moderate water clarity if moderate is within the acceptable parameter.

RESPONSE #99: The department disagrees. The department's intent is to set an acceptable operational range in Circular FCS 3-2018, Chapter 7(G)(1) [renumbered 7.7.1] for clarity from Excellent to Moderate. The pool may remain in operation in those ranges without direct enforcement action. However, in order to head off imminent pool closure, the department wishes to give the operator separate instructions to begin corrective actions when the water clarity is at Moderate. The department believes that if the operator does not begin corrective actions and record those corrective actions then this would constitute a separate violation that is unrelated to the accepted operational parameters.

COMMENT #100: A commenter comments on Circular FCS 3-2018, Chapter 9(E) that attendant requirements are broken up and confusing.

RESPONSE #100: The department agrees and has amended the requirements.

COMMENT #101: A commenter recommends changes to Circular FCS 3-2018, Chapter 7(B)(1) to allow regulatory discretion on testing frequency for pools with non-automated chemical feeders.

RESPONSE #101: The department disagrees and believes that statewide consistency needs to be maintained for testing frequency.

COMMENT #102: A commenter stated that it is unusual to capture the operation requirements in a circular, rather than adopt regulations and asks if this is due to the cost of publishing ARMs.

RESPONSE #102: The department has proposed to adopt the Circular in accordance with 2-4-307, MCA, which provides that an agency may adopt by reference any model code or other similar publication if publication would be unduly cumbersome, expensive, or otherwise inexpedient.

COMMENT #103: A commenter requests that the effective date for the new pool rules not occur during the height of swimming season.

RESPONSE #103: The department agrees and is proposing an effective date of January 1, 2019.

COMMENT #104: A commenter provided a list of typographical errors in Circular FCS 3-2018.

RESPONSE #104: The department agrees and has addressed all of the noted typographical errors.

COMMENT #105: A commenter comments that the Statement of Reasonable Necessity for New Rule III refers to a "manual created by food and consumer safety section."

RESPONSE #105: The "manual" referenced in the Statement of Reasonable Necessity is Circular FCS 3-2018.

COMMENT #106: A commenter recommends changes to Circular FCS 3-2018, Chapter 6(B)(5) and (6) to require records to be kept onsite.

RESPONSE #106: The department agrees and has made the change.

COMMENT #107: A commenter comments that Circular FCS 3-2018, Chapter 7(B)(7) would be better worded "combined chlorine must be determined prior to opening to the public."

RESPONSE #107: The department agrees and has made the change.

COMMENT #108: A commenter comments that Circular FCS 3-2018, Chapter 7(B)(7) would be better worded "Chemical balance, as determined by the saturation index, must be calculated at least monthly."

RESPONSE #108: The department agrees and has made the change.

COMMENT #109: A commenter comments that Circular FCS 3-2018, Chapter 7(B)(8) would be better worded "CYA must be tested at least monthly at all public swimming pools utilizing CYA."

RESPONSE #109: The department agrees and has made the change.

COMMENT #110: A commenter comments that Circular FCS 3-2018, Chapter 7(C)(1) and (2) are in conflict.

RESPONSE #110: The department agrees that there may be confusion and has made changes to the language in Chapter 7(C)(1) and (2) [renumbered 7.3.1 and 7.3.2].

COMMENT #111: A commenter suggests modifications to Circular FCS 3-2018, Chapter 8(B)(2) to allow for substantially similar wording to the sign requirement.

RESPONSE #111: The department disagrees and believes best practice is to maintain statewide consistency for signage.

COMMENT #112: A commenter recommends changes to Circular FCS 3-2018, Chapter 9(D) to require plans to be kept onsite.

RESPONSE #112: The department agrees and has added language to Chapter 6(B) [renumbered 6.2], staffing plans and zones of patron surveillance must be kept onsite and readily available.

COMMENT #113: A commenter comments that Circular FCS 3-2018, Chapter 10(A)(1)(a) uses, but does not define, the term "proper signage".

RESPONSE #113: The term "proper signage" is addressed in Chapter 10(A)(6) [renumbered 10.1.6]. The department has amended Chapter 10(A)(1)(a) [renumbered 10.1.1(a)] to remove the language "with proper signage".

COMMENT #114: A commenter comments that temperature requirements in Circular FCS 3-2018, Chapter 10(A)(1)(b) are inconsistent with other temperature requirements in this circular.

RESPONSE #114: The department agrees and has modified the language in Chapter 10(A)(1)(b) [renumbered 10.1.1(b)].

COMMENT #115: A commenter made a series of statements concerning the minimum number of lifeguards and implied duty of lifeguards in Chapter 8 and Chapter 9, and requests a state-defined minimum requirement to assure proper coverage and appropriate staffing.

RESPONSE #115: Minimum requirements are provided for under Chapter 9(A) [renumbered 9.1] and Chapter 9(D) [renumbered 9.4]. These rules are consistent with MAHC as well as lifeguard training programs.

6. These rule adoptions, amendments, and repeals are effective January 1, 2019.

/s/ Robert Lishman  
Robert Lishman  
Rule Reviewer

/s/ Laura Smith, Deputy Director for  
Sheila Hogan, Director  
Public Health and Human Services

Certified to the Secretary of State October 23, 2018.